TENG SUAY BA & ANOR.

v.

YEO KEE AIK

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CIVIL SUIT NO. 25-78 OF 1984]
27 JANUARY 1993

PRACTICE & PROCEDURE: Application for stay of execution pending appeal - Principles applicable - Section 73 Courts of Judicature Act 1964.

The defendant against whom damages were awarded in favour of the plaintiff applied to stay the execution of the judgment pending appeal. The question that arose was firstly whether the defendant had established that there was no reasonable probability of getting the damages and costs back if they were paid and secondly whether the defendant had established that there were merits in the appeal.

Held:

[1] There was nothing to indicate that the deponent of the affidavit supporting the application for stay was able of his own knowledge to prove the facts supporting the possibility that the defendant would not have any prospect of recovering the debt in the event that the defendant succeded in the appeal as deposed.

[2] Inasmuch as the deponent may have been deposing to matters of information or belief, he failed to provide the source and grounds thereof. The defendant should have investigated the financial standing of the plaintiff and placed the result before the Court in the form of an affidavit regular in every respect.

[3] The defendant had failed to discharge the burden of showing that the findings of the trial Court were plainly wrong. The judgment of the trial Court was based essentially on findings of fact and a perusal of the judgment disclosed little or no chance of success in the appeal.

[4] Having considered all the circumstances of the case, the defendant had failed to satisfactorily show that the appeal was *bona fide*.

[Application for stay of execution dismissed. Judgment debt and interest ordered to be paid to plaintiffs' solicitors to hold as stakeholders pending determination of appeal].

Cases referred to:

Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***

Monk v. Bartram [1891] 1 QB 346 CA ***(refd)***

The Annot Lyle [1886] 11 PD 114 at p. 116 ***(refd)***

Serangoon Garden Estate Ltd. v. Ang Keng [1953] 19 MLJ 116 ***(refd)***

Mohamed Mustafa v. Kandasami (No. 2) [1979] 2 MLJ 126 at p. 127 ***(foll)***

Barker v. Lavery [1885] 14 QBD 769, CA ***(refd)***

Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd. [1989] 2 CLJ 584/[1989] 3 MLJ 40 at p. 44 ***(refd)***

Chow Yee Wah & Anor. v. Choo Ah Pat [1978] 2 MLJ 41 ***(refd)***

Harman v. Crilly [1943] 1 KB 168 ***(refd)***

Morey v. Woodfield [1961] Times, 12 July ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 73

Rules of the High Court 1980, O. 41 r. 5

Other sources referred to:

The Supreme Court Practice 1985, Vol. 1, paragraph 34/5/2, pp. 536 and 537

For the plaintiff - Toh Chin Chong; M/s. Murphy and Dunbar

For the defendant - J.S. Dhalliwal; M/s. V.P. Nathan & Partners

JUDGMENT

Richard Talalla J:

The plaintiffs were respectively the administrators of the estate of a motorcyclist and his pillion rider who were killed in a collision between their motorcycle and a motorcar driven by the defendant. On 21 June 1992 after a full trial the plaintiffs obtained judgment against the defendant wherein the defendant was adjudged to be 100% liable in negligence for the accident and there was awarded by way of damages to the first plaintiff a sum of RM59,781.31 and the second plaintiff a sum of RM40,857.75, interest and costs. The defendant being aggrieved by the judgment appealed to the Supreme Court against the same. The defendant then applied to this Court for a stay of execution of the judgment pending appeal.

There is a plethora of judicial decisions relating to applications for stay of execution of judgment pending appeal. Some speak to special circumstances as being a pre-requisite to a successful application. In *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86, Raja Azlan

Shah J., now DYMM Seri Paduka Baginda Yang DiPertuan Agong Raja Azlan Shah defined special circumstances as follows:

> Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

In *Monk v. Bartram* [1891] 1 QB 346 CA Lord Esher, MR said that it is impossible to enumerate all the matters that might be considered to constitute special circumstances. Yet in the 100 years since Lord Esher spoke, in most cases the circumstances have been singularly common namely the successful party claiming that he should not be deprived of the fruits of his judgment, the unsuccessful party on the other hand, having appealed, apprehensive that the appeal, if successful, would be nugatory for there would be no fruits to recover if in the interim the successful party were allowed to set his hands on these fruits and having done so swallowed them up. In the end it was considered best to apply the law by which this Court is bound. That law makes no reference to special circumstances. I am governed by the provisions of s. 73 of the Courts of Judicature Act 1964. There it is provided that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the Court below or the Supreme Court so orders and no intermediate act or proceeding shall be invalidated except so far as the Supreme Court may direct. My first observation is that as stated in the section itself the appeal shall not operate as a stay of execution, the legislative *imprimatur* to what the Courts have said for more than a century namely, that a successful litigant is not to be deprived of the fruits of that person's litigation. See *The Annot Lyle* [1886], 11 PD 114 at p. 116, Per Bowen, LJ., *Monk v. Bartram* abovestated and *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] 19 MLJ 116. The second observation is that inasmuch as an unsuccessful litigant wants it otherwise the onus is on that litigant to satisfy this Court that it is just and reasonable that it should be ordered otherwise. In the instant case the defendant sought, to do this by raising the usual objection to wit that an appeal against the decision having been lodged the appeal if successful might be rendered nugatory if execution is not stayed. Again I look to authority by which this Court is bound. It is found in the dictum of Abdul Hamid J., as he then was, in the Federal Court case of *Mohamed Mustafa v. Kandasami* (No. 2) [1979] 2 MLJ 126 at p. 127 which is as follows:

> On the question of stay of execution it is I think settled law that the granting of such a stay is a matter of the Court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. One of the determining factors that calls for consideration is whether by not making an order to stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal. How pertinent that factor would be may vary according to the circumstances of each particular case.

In reference to this dictum, as I see it, the defendant had to establish two factors before I could be so satisfied; firstly, no reasonable probability of getting the damages and costs back if they were paid and secondly, some basis for the appeal succeeding or as Brown, J. said in the *Serangoon Garden* case, merits in the appeal. Reverting momentarily to the concept of special circumstances, the first factor standing by itself has been held not to constitute special circumstances. See the *Serangoon Garden* case. Likewise the second factor on its own, for as said by Lord Esher in *Monk's* case allegations of misdirection, the verdict being against the weight of evidence or that there was no evidence to support it are not special circumstances. However a combination of the two factors could be said to constitute special circumstances as declared by Brown, J. in the *Serangoon Garden* case and echoing what Lord Esher, MR said in *The Annot Lyle* case as above referenced. That these combined factors are termed special circumstances is to my mind of no consequence. Rather the consequence of the combined circumstances is that they constitute grounds for ordering stay under s. 73 and the said dictum both of which I am bound by.

As to the first factor the vehicle is usually an affidavit supporting the application. See *Barker v. Lavery* [1885] 14 QBD 769, C.A. There was such an affidavit before me. The application was an interlocutory proceeding. Section 73 itself speaks to it being so. Accordingly the provisions of O. 41 r. 5 of the

Rules of the High Court 1980 became applicable. They are to the effect that an affidavit may contain only such facts as the deponent is able of his own knowledge to prove and that inasmuch as it is used in interlocutory proceedings it may contain statements of information or belief with the sources and grounds thereof. It was a partner in the firm of solicitors acting for the defendant who affirmed the affidavit. In it he deposed *inter alia* that if the application was not allowed and the judgment debt was paid there was a possibility that the defendant would not have any prospect of recovering the debt in the event that the defendant succeeded in the appeal. There was nothing to indicate that the deponent was able of his own knowledge to prove the facts supporting the possibility deposed to, if at all there were such facts. Being no more than a partner in the firm of solicitors acting for the defendant, he would not ordinarily have had personal knowledge of the plaintiff's financial standing. Inasmuch as the deponent may have been deposing to matters of information or belief, he failed to provide the source and grounds thereof. The defendant should have investigated the financial standing of the plaintiff and placed the result before the Court in the form of an affidavit regular in every respect. See the decision of N.H. Chan, J. in *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1989] 3 MLJ 40 at p. 44. I find the defendant failed to establish the first factor.

As to the second factor the partner deposed to a belief that there was merit in the appeal but provided no grounds for that belief. The trial stretched over a period of five days. A total of seven witnesses were called on behalf of the plaintiffs including the plaintiffs. For the defence only the defendant testified. The trial Judge who I would say with respect was of many years experience delivered a written judgment running into eleven pages. The judgment was based essentially on findings of fact. It was a reasoned judgment a perusal of which discloses little or no chance of success in the appeal. There was not the slightest indication from the defendant that the judgment was wrong. As stated above and upon a host of authorities, I need only refer to the Privy Council case of *Chow Yee Wah and Anor. v. Choo Ah Pat* [1978] 2 MLJ 41, the burden was on the defendant to show the said findings to be plainly wrong. Ordinarily there should be no difficulty in pointing out something that is plainly wrong. Yet the defendant did not do so. There was no evidence to indicate whether the deponent had any knowledge at all of this action or the trial. Certainly he did not appear as Counsel at the trial or indeed in any of the interlocutory proceedings leading to the trial. He merely deposed to being a solicitor having the conduct of the suit. He did not even depose to the period during which he had such conduct. Counsel representing the defendant at the trial would have been the person best qualified to point out any finding which could be reasonably argued as being plainly wrong, combined with Counsel retained by the defendant in the appeal. There was no word from them. Accordingly I find that the defendant also failed to establish the second factor.

Again in reference to the dictum abovestated, I see it as requiring the Court to consider all the circumstances of the case. Accordingly I do so. This was a running down action. The accident occurred as far back as June 1983. The action was commenced in April 1984. Through no fault of the plaintiffs it was only in 1992 that they obtained judgment. Running down actions like this one fill our hearing lists. Ordinarily they are easily determined, there being only two issues, negligence and the quantum of damages, both issues calling for findings of fact based on stereotype evidence. That evidence invariably consists of two versions of the accident one or both of which wholly or in part not true, the sketch plan and key, photographs and vehicular damage as provided by the police investigating officer. The findings being of fact are only upset on appeal if demonstrated to be plainly wrong. It is little wonder that findings of fact in running down actions are seldom disturbed. It is an open secret that in running down actions the defendant on record is seldom the real defendant. *Dominus litis* and the one to foot the damages is the insurance company behind the defendant. Judges are not affected by the revelation. See *Harman v. Crilly* [1943] 1 KB 168. See further *Morey v. Woodfield* [1961] Times, 12 July, where Glyn Jones, J. sitting with a jury, in his summing-up, said:

> I am not going to be bound by the old-fashioned rule which has long out-lived its usefulness and pretend that damages are

going to be paid by the defendant. They are not and you all know it.

What does concern the Court is that there is a massive backlog of cases resulting in justice being delayed, such as in this case. It cannot be denied that certain defendants exploit this situation to the maximum. Their aim is to put off for as long as possible payment of damages which truly and reasonably should long since have been paid. It is part of the machinery of justice that cases should be settled. See **The Supreme Court Practice 1985,** Vol. 1, paragraph 34/5/2, pp. 536 and 537. In that way the machinery runs smoothly and efficiently. Yet they do not settle. On the contrary they dispute every issue thus forcing the plaintiff to proceed to trial. As a result more and more suits are entered in the trial lists and the machinery of justice becomes overburdened, bogged down and grinds towards a halt, so perpetuating the situation and its exploitation. It is a vicious circle. It is an abuse of the Court's process. The abuse has been known to carry on to and through the process of appeal. Often appeals are withdrawn at the last moment - upon hearing the rustle of the Judge's gown as the saying goes. *A fortiori* in an application such as this the Court should be satisfied that the appeal is *bona fide.* The defendant failed to satisfy me so.

Accordingly I indicated that the application would be dismissed. Thereafter upon application by Counsel for the defendant and by consent the judgment debt and interest was ordered to be paid to the plaintiff's solicitors to hold as stakeholders pending determination of appeal.

THE GOVERNMENT OF MALAYSIA

v.

DATUK HAJI KADIR MOHAMAD MASTAN AND ANOTHER CASE

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CIVIL SUIT NO. T. 73 OF 1991/T. (22) - 62 OF 1992]
19 JULY 1993

PRACTICE AND PROCEDURE: Stay of execution - Special circumstances - Whether successful appeal would be rendered nugatory - Delay and cause of delay in the hearing of the appeal - Merits in the appeal.

The plaintiff initiated two suits against the defendant for tax assessments and obtained summary judgments. Before the suits were filed and after receiving the notice of assessment the defendant objected to the quantum of assessments. The plaintiff agreed to stand over the tax pending the outcome of appeals to the Special Commissioners. However the Special Commissioners were yet to hear the appeals despite the long delay which was not due to the fault of the defendant. The defendant applied for stay pending the hearing of the appeals to the Special Commissioner.

Held:

[1] It is not disputed that s. 103(1) of the Income Tax Act 1967, provides for the assessed amount to be due and payable upon service of the relevant notice irrespective of whether there is any appeal but the Act does not have any provision curtailing or restricting the inherent jurisdiction of the Court to stay an execution. When a party wishes to exercise a right to resort to the procedures of the Court to enforce a judgment, that right is subject to the powers of the Court which included a power under its inherent jurisdiction to stay an execution subject to established judicial principles.

[2] Since there is substance in the appeal and coupled with the fact that it was no fault of the defendant that his appeal was not yet heard by the Special Commissioners, execution is stayed.

[Application allowed].

Cases referred to:

Mohamed Mustafa v. Kandasami (No. 2) [1979] 2 MLJ 126 ***(cit)***

Serangoon Garden Estate Ltd. v. Ang Keng [1953] MLJ 116 ***(cit)***